

ALLAHABAD HIGH COURT

Shakir Husain

Vs.

Chandoo Lal

(Sulaiman, Ag. C.J)

22.07.1931

JUDGMENT

Sulaiman, Ag. C.J.

1. I concur in the conclusion, and would only add a few words because the question is one of general importance. No doubt there is some inconsistency between Order 21, Rule 43 and Rule 122 added by the High Court. The former requires that the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates. The latter requires that he shall, subject to approval by the Court, make such arrangement as may be most convenient and economic. If the Court approves of it, he can certainly put the property in the custody of some one else other than a subordinate officer.

2. Under Section 122, Civil P. C, the High Court has power to annul, alter or add to any of the rules in the first schedule. If a new rule that has been added is to some extent in conflict with the previous existing rule, I think the new rule must by implication be deemed to have annulled or altered that rule. The new rule, if not consistent with the old rule must prevail. Bui so far as the question of the responsibility of the attaching officer is concerned, I do not think that there is necessarily any inconsistency. Under Rule 43 he is responsible for the due custody thereof. It is his duty to make the most convenient and economical arrangement, but his legal responsibility will continue till the Court approves of the arrangement. When the Court has approved of it, his responsibility comes to an end; but pending approval it subsists.

3. Of course the expression "subject to approval by the Court" implies that the arrangements which are considered by him to be most convenient and economical must be made by him first and approved by the Court subsequently. It is not necessary for him to submit his proposal beforehand and get an approval though such a course is not impossible. The appointment of a custodian or supurddar and the placing of the attached property in his custody and the taking of a security from him are arrangements within the scope of Rule 122. But the appointment of a sahana (guard or watchman) putting him in special charge of a property is done under Rule 123

and must be with the permission of the Court. Ordinarily the difference between the approval and permission is that in the first the act holds good until disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently obtained may all the same validate the previous act. I also think that although a sahana would not be a surety, a supurddar, who has given an undertaking to produce the goods when ordered by the Court, is a surety although the undertaking is not given to the Court directly but through the attaching officer.

4. Under Section 145, Civil P. C, where any person has become liable as surety for the restitution of any property taken in execution of a decree, the decree may be executed against him to the extent to which he has rendered himself personally liable. The supurddar by his undertaking becomes liable as a surety for the restitution of the property attached in execution of the decree, and can certainly be proceeded with under this section. This of course does not imply that remedy by a separate suit also does not lie, Section 145 gives the option to proceed against him in execution, but does not compel him to do so as to prohibit a separate suit. Indeed, where by the security a charge has been created on immovable property the remedy to enforce that charge is only by separate suit.

Mukerji, J.

5. One Chandoo "Dal had a simple money decree to execute against Ram Gopal and others, judgment-debtors. In execution of that decree, the a min of the Court,. Shakir Husain, attached, by seizure, ornaments worth ₹ 1,280 on 27th June 1929. The warrant issued to him was for attachment of such moveable property as might be pointed out by the decree-holder. The ornaments were attached at the instance of the decree-holder's agent, Nanhe Mal, who pointed out the ornaments to be attached. One Birjnandan Prasad was put forward as the man into whose custody the ornaments might be given for safe custody. The amin's report is to the effect that the decree-.holder's man, Nanhe Mal, approved of Birjanandan Prasad as trustworthy. Birjnandan Prasad executed on the same day (27th June 1929) a supurd-nama or acknowledgment, having got in his possession the properties, and agreed that he would hand over the goods whenever the Court wanted the same, or in default he would pay the estimated price thereof: see document No. 7-C, execution file 11. The amin sent on his report recorded on the back of the warrant for attachment to the Court. This report purports to bear the signature of Nanhe Mal, where Nanhe Mal describes himself as ' nishan dahinda."

6. The report was received in the office of the executing Court, namely, the Subordinate Judge, Moradabad, prior to 3rd July 1929. On 3rd July, which had been fixed in the case, the following order was passed by the Subordinate Judge:

Attachment has been effected according to law. Further (execution) costs have not been paid. It is ordered that the decree-holder should pay in further costs by 10th July 1929.

7. The execution was stayed by an order of the appellate Court, and an order to that effect was recorded by the Subordinate Judge on 7th August 1929.

8. On 17th February 1930 the decree-holder made an application to the executing Court to the effect that the appellate Court had dismissed the appeal, that the goods attached were with the judgment-debtor, that the sapurddar or custodian of the attached goods had died and that the goods should be recovered from the judgment-debtor. On this application being received, a notice was issued to Ram Gopal, judgment-debtor, to produce the goods on 11th March 1930. On that date the Court directed the decree-holder to disclose the names of the heirs of the deceased supurddar within a week. After some adjournments, on 12th April 1930, the Court recorded an order to the effect that the supurddar was dead, that the decree-holder was unable to furnish the whereabouts of his heirs, that the judgment-debtor urged that his ornaments of value exceeding the amount of the decree had been attached and so he should not be made to suffer, that the amin had not taken the Court's permission for the appointment of the supurddar, and the Court accordingly directed the amin to appear and to explain his position. The amin appeared on 3rd May 1930, and his statement was recorded. The decree-holder had already been examined on 12th April 1930. On 9th May 1930, by a long judgment, the Subordinate Judge held that the amin was responsible for the loss, and gave him a month's time within which to arrange for the recovery of the goods.

9. Against this order the amin has filed a petition in revision, and the contention in his behalf is that he is not liable, having done all that was required of him under the law.

10. The decree-holder unfortunately has not appeared in the case. But two counsels have appeared, one on behalf of Ram Gopal, and the other on behalf of the heir of the deceased supurddar Birjnandan Prasad.

11. The main ground on which the learned Subordinate Judge has held the amin to be responsible is that the amin was bound, before he handed over the goods to Birjnandan Prasad, to obtain the permission of the Court under Rule 123, Order 21, Civil Procedure Code. The learned Subordinate Judge bases his opinion on a ruling of this Court, namely; *Badri Prasad v. Chokhe Lal*,

12. One of the questions that we have to determine is whether this case has been rightly decided.

13. The judgment does not clearly give the facts, and I have looked into the paper book of the case. It appears that certain goods were attached before judgment and were handed over to one Badri Prasad. The suit was dismissed, and the defendant asked for his goods. A pleader of the Court had been appointed commissioner " to effect the attachment, and the pleader, having made the attachment, handed over the goods to the custody of Badri Prasad. The Court below held that

Badri Prasad was liable for the value of the goods, and he filed a revision in this Court. This Court held that it was the commissioner, who effected the attachment, who was really responsible, and accordingly made a decree against him for the value of the goods attached.

14. The decision was based mainly on Rule 43 and Rule 123 (it was then numbered as 124), Order 21, Civil Procedure Code. It may be mentioned here that Order 21, Schedule 2, Civil Procedure Code, as originally passed by the legislature, contained 103 rules. Certain rules were added by the High Court at Allahabad, namely Rules 104 to 140. These rules have undergone a slight change, and therefore it was necessary to re-number them.

15. Rule 43 lays down that the attachment of movable property in the possession of the judgment-debtor shall be made by actual seizure, and directs the attaching officer to keep

¹ AIR 1926 All 406 : (1926) ILR 48 All 510 : 95 Ind. Cas. 828

the property in his own custody or in the custody of his subordinates, and holds the attaching officer responsible for the due custody of the property. Rule 123, (Rule 124 old) says that, with the previous permission of the Court, the attaching officer may place one or two persons in special charge of the attached property. It was held in the case of Badri Prasad that the commissioner (Mr. Mohammad Ibrahim) was responsible for the custody of the goods under Rule 43, and that as he had failed to obtain the previous permission of the Court before he handed over the property to Badri Prasad, he was the only person liable to the Court for the value of the goods.

16. It appears to me that the attention of the learned Judges was not drawn to Rule 122 (old Rule 123), Order 21. This lays down that for the safe custody of move-able property, other than live stock, the attaching officer shall, subject to approval by the court, make such arrangements as may be most convenient and economical. The case that was before the learned Judges fell within Rule 122 (E. 123 old), and not under Rule 123 (old Rule 124).

17. Rule 124 (old Rule 125) lays down that where, with the previous permission of the Court, one or more persons are placed in special charge of attached property, the wages of the persons so placed in charge shall not be less than four annas a day or more than six annas a day. This shows that Rules 123 and 124 apply to the appointment of watchmen or guards, otherwise known as "sahanas" who are usually appointed to guard standing crops in the fields or crops which have been cut and stacked, and similarly to guard other places where attached goods have been kept. Rule 122 (old Rule 123) is the only rule which applies to cases where moveables like ornaments are attached, and for which some arrangement is necessary for their safe custody. Ornaments cannot very well be left at any place to be watched or guarded by peons getting four to six annas a day.

18. In the case of Badri Prasad, as in the case before us, the attaching officer was entitled to make

suitable arrangements with a view to convenience and economy for the safe custody of the goods, " subject to approval by the Court." Previous permission was not necessary for the purpose.

19. In the case before us. as I have already stated, the amin submitted his report as to the attachment, and distinctly said that goods of the judgment-debtor, pointed out by Nanhe Mal, had been attached and that Nanhe Mal had approved of Birjnandan Prasad as a suitable person to keep in his custody the ornaments.

20. The Court declared, on the receipt of the amin's report, that the attachment had been legally made, and directed the decree-holder to produce further costs for execution. It follows that the Court approved of the procedure adopted by the amin, as required by Rule 122. We must take it that the report of the amin was read by or was read out to the Court and the Court was satisfied with the custody of Brijnandan Prasad. Indeed, there was nothing to take exception to, as Brijnandan Prasad had been approved by Nanhe Mal as a proper custodian. The decree-holder himself must have at once come to know in whose custody the attached goods had been placed, and he never told the Court that the goods had been placed with a wrong man and that these should be recovered from him and kept in some other custody.

21. It appears to me that, in view of what had happened, the amin was exonerated of all liability and responsibility in respect of the goods. He was no doubt responsible under Rule 43; but as soon as he complied with Rule 122, his responsibility ceased.

22. It appears to me that there is a little conflict between Rule 43 and Rule 122, inasmuch as Rule 43 directs the attaching officer to keep the attached goods either in his own custody, or in the custody of one of his subordinates. This is, as a matter of fact, an impracticable rule so far as the amins of subordinate civil Courts in the province of Agra are concerned. They are supplied with only one peon, and that is his only " subordinate." The amin is not supplied with any iron safe to keep valuables, and in the course of a month he makes at least seven or eight attachments of moveable property. He would require a very large godown, sufficiently safe to keep valuables and other goods, and a sufficient number of guards for the safety of the goods kept there. Rule 122 was made by the High Court under its rule-making powers given by Section 122 of the Code, and therefore Rule 122 has the same force of law as Rule 43.

23. As a matter of history, the handing over of attached goods to the custody of supurddars or custodians is a very old practice and is universally followed in the province of Agra. In the circumstances I must hold that Rule 122 has preference over so much of Rule 43 as requires the attaching officer to keep the goods in his own custody or in the custody of one of his subordinates. The amin's responsibility lay in selecting, to the best of his ability, a right person for keeping the goods in his custody, and in this particular case, when he had the guarantee of the decree-holder's man as to Birjnandan Prasad being a proper person, and when the Court approved of the amin's procedure, the amin was exonerated from further responsibility.

24. It would no doubt be desirable that the High Court should, under its rule-making powers, amend Rule 43 so as to make it consistent with Rule 122. But in view of the fact that Rule 122 is always Followed in the Subordinate Courts, and the rule as to the attaching officer keeping the goods in his own custody or in the custody of one of his subordinates is more honoured in its breach than its observance, besides being impracticable, we cannot hold the applicant before us liable.

25. In my opinion, the case of *Badri Prasad v. Chokhe Lal* was wrongly decided and should be overruled.

26. The question that next arises is, who is liable for the production of the goods attached? The obvious answer would be Birjnandan Prasad, and, on his death, his estate in the hands of his heir or theirs.

27. In the case of *Madho Prasad v. Peary Lal*², a similar question arose. The Court below held that the supurddar was liable under the provision of Section 145, Civil P. C, as the person who had guaranteed that the attached property would be forthcoming when demanded, or at any rate, under the inherent power of the Court, which had a right to demand the property from the man in whose custody it had been placed by an officer of the Court. A learned Judge of this Court, who heard an application in revision against that order, upheld the decision of the Court below on the ground that Section 145 applied. In

² AIR 1921 All 220 : 62 Ind. Cas. 719

my opinion, Section 145 (c) does apply. It appears that when a man comes forward of his own free will and accord to take charge of property attached, and undertakes to make a restitution of the same, he is the person liable as if the decree had been made against him. Again, if for any reason which is not clear to me, it should be said that Section 145 is not applicable, I do not see why we should not hold the man who has appeared in the execution proceedings, to take charge of the goods, responsible for the value of the goods. He gets a chance to show cause why he should not hand over the goods or pay their value, and this is all that is needed for his liability.

28. In any view of the case, the liability of the supurddar seems to be clear.

29. In this particular case, although the heir of Birjnandan Prasad appeared before us through her counsel, the question of the liability of the heir or the estate of Birjnandan Prasad has not yet been investigated by the Court below, and it would not be fair to make a decree in revision against Birjnandan Prasad's heir, without further investigation. It is clear that Birjnandan Prasad will be estopped from saying that he is not responsible, he having let the amin hand over the goods to him on the representation that he would hand back the goods when called upon to do so. I do not know what defence the heir of Birjnandan Prasad may raise but it is necessary that an

opportunity should be given to her to raise any valid objection that may be there.

30. For the reasons given above, I would set aside the order of the Court below against the applicant and remand the case to the lower Court for an investigation as to the liability of Birjnandan Prasad's heir and estate, if the decree-holder wants to proceed against them. If the decree-holder does not want to proceed against them, it must be taken that his decree has been satisfied; for the judgment-debtor having allowed his property to be attached, and the property being of sufficient value to cover the decree, he should not be held any further liable. These are however points which I would not finally decide but would mention only by way of guidance for the Court below. As the order against the applicant was obtained at the instance of the decree-holder I would make the decree-holder liable to pay the costs of the present application and the costs of the application in the Court below, the costs in this Court including fees on the higher scale.

Boys, J. –

31. This revision arises out of the interpretation of Order 21, Rule 43, and Rules 122 and 123.

32. Chandoo Lal, the present opposite party, obtained a decree against Ramgopal, Sahu Bisheshar Nath and others. He applied for attachment, and Shakir Husain, the present applicant before us, an amin, went to attach the judgment-debtor's property accompanied by Nanha Mal, paiokar of the decree-holder.

33. On 27th June 1929, the amin attached ornaments of the value of ₹ 1,200 and entrusted them to one Birjnandan Prasad as supurddar, a man, and this is important, whose selection was expressly approved by Nanhe Mal, the representative of the decree-holder and a supurd-nama was taken from Birjnandan Prasad.

34. On 3rd July 1929, the amin Shakir Husain made his report of these proceedings to the Court filing therewith the supurdnama. He does not appear to have specifically asked for approval by the Court of his proceedings, but it must be held that the Court did approve his proceedings by its order to be found on the order sheet, in which it held that the attachment had been carried out according to law. It is impossible to hold that this order covered only the actual taking possession of the ornaments by the amin and not the handing over of them to the supurddar: it covered the whole proceeding. Brijnandan Prasad at some time after these last events died. On 17th February 1930 the decree-holder applied to the Subordinate Judge for sale of the ornaments, alleging that they were still with the judgment-debtor and that there had been no real attachment, and that they had never really been handed over to Brijnandan Prasad. Making these allegations, the decree-holder did not ask for any relief against either the amin Shakir Husain or the heirs of the supurdar Brijnandan Prasad. On 9th April 1930, the Court gave an opportunity to Shakir Husain to produce the ornaments or cause them to be produced. Shakir Husain relied unsuccessfully on the

established practice of handing over property in such a case to sipurddar; and a decree was passed against him by the Subordinate Judge. Shakir Husain comes here in revision. His case has been presented to us by Dr. Faruqi, and we have also had the advantage of hearing Mr. Shabd Saran on behalf of the heirs of the sipurddar, and Mr. Vishwa Mittra on behalf of the judgment-debtor. The decree-holder has not appeared.

35. The material provision in the Code of Civil Procedure, as it was enacted by the legislature, is to be found in Order 21, Rule 43. At a subsequent date this Court transferred from the general rules of the Court, among others, rules which are now to be found in Order 21 as Rules 122 to 127. Those material for our present purpose are Rules 122 to 124. It is manifest that these rules are to a very great extent in conflict with Order 21, Rule 43, and it is only by inadvertence that when Rules 122 to 124 were added no provision was made for deleting, so far as this Court is concerned, Rule 43.

36. Rule 43 provided that the attaching officer should keep the property in his own custody or in the custody of one of his subordinates. Rule 122 on the other hand authorized him to make such arrangements as may be most convenient and economical. Rule 43 again made the attaching officer "responsible for the due custody" of the property; while Rule 122 has provided for the Court's approval of the arrangements which he might make: and it is manifest that from the date of such approval his responsibility would cease.

37. The two rules are therefore in manifest conflict. It is equally obvious that the conflict is due to inadvertence; and by the ordinary rule of interpretation of statutes the later rules must prevail. It is manifestly also a case to which the rule of beneficial interpretation is applicable, in so far as the liability of the amin is concerned; and the beneficial interpretation would clearly lie in the direction of giving effect to Rules 122 to 124. We proceed therefore to consider these rules.

38. In my view it is Rule 122 which is clearly applicable. Rules 123 and 124 are-applicable to the case of a sahana who is to be in charge of such property as growing crops. In the present case the amin made an arrangement which not only he considered the most convenient and economical, but an arrangement which on the findings of fact was approved and even suggested by the decree-holder's representative. It is, in our view, immaterial whether the sipurddar thus approved by the decree-holders own representative actually took the property into his own custody or whether he chose to trust the judgment-debtor. That was a personal matter between him and the judgment-debtor and would affect in no way whatever the liability which he undertook to the decree-holder. The next step was the report of what he had done by the amin to the Court and, as I have found, the approval of what he had done by the Court by its order endorsed on the order sheet. If the Court had not approved the arrangement by the amin his liability would have remained, but once his action was approved by the Court his responsibility ceased unless, of course, some question of fraud or collusion between aim and the judgment-debtor or the rapurddar might be established. But of such there is no question in the present case. With this

review of the circumstances and expression of opinion in regard to these legal aspects this judgment might have concluded, but there are two matters which in the particular circumstances of the case call for further consideration.

39, The first is that we have been pressed with the decision in *Badri Prasad v. Chokhe Lal*. In that case cloth was attached and handed over to the custody of one Badri Prasad. The commissioner made a report to the Court stating that he had made over the property to Badri Prasad and had completed the performance of the task allotted to him. It was found by the learned Judges, and this was largely the basis of their eventual decision, that the commissioner i. e. the attaching officer, did not ask for or obtain any "permission." At a later date Badri Prasad appears to have endeavoured to hand over his responsibilities to another person who is at p. 563 of the report referred to as the custodian and who died. But the Courts below naturally would not recognize Badri Prasad's right to so hand over his responsibilities, and he was treated as the person to whom the property had been entrusted. Eventually the suit in which the attachment was made was dismissed, but the attaching officer failed to secure the return of the property. Badri Prasad objected that he was not responsible to the Court as he was not an officer of the Court; but a decree was passed against him. Badri Prasad then came to this Court in civil revision making Chokhe Lal, the decree-holder, the opposite party. The Court considered that the attaching officer should also be a party, and after having so made him a party eventually set aside the decree passed against Badri Prasad and substituted therefore a decree making the attaching officer liable for the loss. "We are not told in the report how the property came to be lost.

40. Now it is clear that the learned Judges in arriving at that decision treated the case as if it was one falling under Rule 123, for they say:

in the present case the attaching officer preamably acted under Rule 124 (the present Rule 123) then he placed Badri Prasad in special charge of the property, and to make Badri Prasad able to the jurisdiction of the Court, it was necessary for the commissioner to obtain the permission of the Court. No such permission was obtained..., The permission ought to have been obtained at the proper time before or immediately after the custodian is appointed.... To permission having been obtained Badri prasad was not an officer of the Court and the court had no jurisdiction to direct him to refund the price.

41. The Court went on then to hold that he attaching officer was the only person able. I am unable to assent to the correctness of this decision either as to she immunity conferred upon the surety or as to the liability imposed upon the attaching officer. The rule really applicable was Rule 122. The permission, of the Court required by Rule 123 is permission to appoint a sahana or sahanas. Neither in the case of *Badri Prasad v. Chohke Lal*, nor in the present ease, is there any question of the appointment of a sahana. I think therefore that both in that case and in the present ease the attaching officer was free from responsibility the moment his actions when reported to the Court had bean approved, and I do not think that it is necessary that such approval should be

expressed by the use of particular words. It is sufficient if it can be properly deduced from any order passed by or other action of the Court.

42. I turn now to the question of the liability of the surety. The facts have not been determined, and it is not therefore for us to pass any final order, but we have been referred to the decision in *Madho Prasad v. Piare Lal*. With the view expressed in that case I am in agreement. The action of the attaching officer in handing over the property to a surety or supurddar is within his lawful powers under Rule 122, and certainly upon his action being approved either expressly or impliedly by the Court, the surety becomes an officer of the Court. But apart altogether from this there is no reason why in suitable circumstances Section 145, Civil Procedure Code, should not be applicable. I would therefore allow the revision and set aside the decree of the lower Court against Shakir Husain with costs against the decree-holder Chandu Lal, and return the case to the lower Court for its consideration of the liability of the heirs of Brijnandan Prasad in regard to such assets of Brijnandan Prasad as there may be in their hands.

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